IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 12.09.2007

CORAM

THE HONOURABLE MR.JUSTICE M.CHOCKALINGAM

W.P.NOS.18402 AND 21621 OF 2007
AND
M.P.NOS.1 TO 3 OF 2007 AND 2 AND 3 OF 2007

P.Chandrasekar,
President,
Marikulam Seeramaipu Committee,
East Laayam,
Pookara Street,
Vilar Road,
Thanjavur-613 001 .. Petitioner in both the petitions

Vs.

1.The Government of Tamil Nadu,
rep. by its Secretary,
Municipal Administration Department,
Fort St. George,
Chennai.
2.The Director of Municipal Administration,
Kuralagam,
Chennai-600 104.
3.The Chairman,
Tamil Nadu Water and Drainage Board,
Government Estate,
Chepauk,
Chennai-600 002.
4.The Thanjavur Municipality,
rep. by its Commissioner,
Thanjavur.
5.The District Collector,
Thanjavur District,
Thanjavur. .. Respondents in W.P.No.18402 of 2007

1.The Government of Tamil Nadu,
rep. by its Secretary,
Revenue Department,
Fort St. George,
Chennai.
2.The District Collector,
Thanjavur District,
Thanjavur.

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3.The Thanjavur Municipality,
rep. by its Commissioner,
Thanjavur.
4.The Executive Engineer,
Tamil Nadu Water Supply and
Drainage Board,
Sewerage Division,
Thanjavur.
(4th respondent was impleaded
vide order in MP No.4 of 2007
dt.12.09.2007 in WP.21621/07] .. Respondents in
W.P.No.21621 of 2007

These writ petitions have been preferred under Article 226 of the Constitution of India, one is for the issue of a writ of mandamus directing the respondents not to construct the drainage and sewerage well in the Marikulam tank situated in T.S.Nos.3334/1 and 3334/3, Block No.83, Ward No.6 at Pookara Street, Thanjavur[WP.18402/07] and the other one is for the issue of the writ of certiorarified mandamus calling for the records relating to the impugned order in G.O.Ms.No.497 Revenue நிழ. 5(1) Department, dated 30.8.2005 from the first respondent and quash the same and direct the first respondent not to transfer the Mariculam tank land situated in S.No.3334/1 (part) of Pudupattinam Village, Thanjavur Taluk and District to the Thanjavur Municipality.[WP.21621/07]

For Petitioner : Mr.N.G.R.Prasad
for Mr.R.Rajaram

For Respondents: Mr.R.Viduthalai, A.G.
for all respondents.
Assisted by G.Sankaran, GA for RR1,2 and 5
in WP.18402 of 2007 and
for RR1 and 2 in WP.21621 of 2007
and Mr.V.Raghupathi for R4 in
WP.18402 of 2007 and for R3 in
WP.21621 of 2007 and
Mrs.Sudarsana Sundar for R3
in WP.18402 of 2007 and for R4
in WP.21621 of 2007

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COMMON ORDER

This order shall govern the above writ petitions.

2.W.P.No.18402 of 2007 has been filed seeking a writ of mandamus to direct the respondents not to construct the drainage and sewerage well in the Marikulam Tank situated in T.S.Nos.3334/1 and 3334/3, Block No.83, Ward No.6 at Pookara Street, Thanajvur, while W.P.No.21621 of 2007 has been brought forth seeking a writ of certiorarified mandamus to quash the G.O.Ms.No.497 Revenue ep.K. 5(1) Department, dated 30.8.2005 passed by the first respondent, and for a direction to the respondents not to transfer the Marikulam Tank, as referred to above, to the Thanjavur Municipality.

3.The court heard the learned counsel on either side.

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4.The facts, as admitted by the parties, are as follows:

There was a proposal for construction of sewerage well, what is in question, to an extent of 8712 sq. ft. in Marikulam Tank, which is having an extent of 3 acres and 24993 sq. ft. For that purpose, a Government Order was also issued. Administrative sanction for the project was also given on 30.12.2000. Following the same, the third respondent, the Thanjavur Municipality, has passed a resolution, approving the project. The Feasibility Report of the project was sought for from the Ministry of Environment and Forest, Government of India. The National River Conservation Department has cleared the project report in the month of December, 2001. The technical sanction in that regard was also sought for, and it was also given on 9.7.2002. Following the work order issued, the work was commenced in January, 2003. The representations were made as against the establishment of the Pumping Station, in question, by one Murthy.

5.While the matter stood thus, G.O.Ms.No.497 (Revenue), dated 30.8.2005 was issued transferring 8712 sq. ft. of the tank to the Thanjavur Municipality. Since it was originally classified as the Government Tank Poramboke, an order of transfer of classification as one Town Poramboke was made by the Collector in the revenue records. Following the same, the transfer was also effected. The work, which was already commenced in January, 2003, was in progress. In September, 2005, W.P.No.31699 of 2005 was filed as Public Interest Litigation for issuance of a writ of mandamus restraining the respondents from proceeding with the construction work in the Marikulam Tank. The writ petition came to be disposed of by the Division Bench of this court in December, 2005. On 28.8.2006, the Thanjavur Municipality has passed a resolution, requesting the Drainage and Sewerage Board to relocate and construct drainage and sewerage well in 800 sq.mts. land adjacent to cremation ground near Marikulam Tank. A letter was addressed by the Commissioner, Municipality, to the Director, Municipal Administration, to compensate them for the amount spent by the TWAD Board so that they can compensate them in turn. Thereafter, another resolution was passed by the Municipality on 30.7.2007 cancelling the resolution dated 28.8.2006. While the matter stood like this, these two writ petitions have been brought forth for the above reliefs.

6.Advancing his arguments on behalf of the petitioner, the learned counsel would submit that it is not in controversy that the land, what is now meant for the purpose of implementing the project within the area of 8000 and odd sq. ft., is part and parcel of Marikulam Tank; that it is true, there was a resolution originally passed by the third respondent Municipality and it was also recommended to the Collector and classifications have been made thereto; that the classification of the land in question, which was described in the revenue records as the Government Tank Poramboke, would be clearly indicative of the fact that a part of the tank, namely 8712 sq. ft., is being taken for the project, and it would be against the G.O.Ms.No.41, Revenue Department, dated 20.1.1987, which was to the effect that there was a ban of taking any water course or tank for any purpose and further, it is also repugnant to the circular, dated 2.4.2001; that a reading of the circular would clearly reveal that all the District Collectors/District Revenue Officers are requested to send proposals, justifying the compelling reasons for the proposed

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allotment of lands in these banned categories of lands; that in the instant case, while it was an admitted position that it was a tank, the recommendations were made by the Municipality for classification of the land as tank poramboke, but transferring a portion of the tank to the Thanjavur Municipality for the purpose in question is in violation of the circular; and that it is true that in a case where there are compelling circumstances, allotment could be made; but, in the instant case, there were no exceptional or compelling circumstances noticed.

7.Added further the learned counsel that in the instant case, while Marikulam Tank is a tank poramboke and that too there is an order, banning the transfer, now making transfer by the impugned G.O., would be nothing but against the public interest; that the tank is surrounded by inhabitants; that if the construction is allowed to be made, there is all possibilities of percolation of sewerage water; that it would go against the water body; that it would not only affect the health of the public, but also affect the ecology and environment and hence, a duty is cast upon the State to protect the same, but on the contrary, it has passed the G.O., in question, which would go against the policy of the State, and it is against the Article 51 A(g) of the Constitution of India and that while a duty is cast upon the State to protect the interest of the public, now it has been done in violation of the Government Order earlier passed and the circular and under these circumstances, the G.O., in question has got to be quashed. The learned counsel for the petitioner relied on the decisions of the Supreme Court reported in AIR 2001 SC 3215 (HINCH LAL TIWARI VS. KAMALA DEVI AND OTHERS) and 2006 (3) SCC 549 (INTELLECTUALS FORUM, TIRUPATHI VS. STATE OF A.P. AND OTHERS).

8.Contrary to the above contentions, the learned Advocate General appearing for the respondents, has made the following submissions:

(i) Firstly, both the petitions are liable to be dismissed on the short ground of application of theory of res judicata. Originally, as Public Interest Litigation, one Murthy, the member of Marikulam Seeramaipu Committee, has filed a writ petition before this court, in which the very relief was sought for, namely to restrain the respondents from locating the said project in the land in question. On enquiry, that writ petition came to be dismissed by the First Bench of this court. For the same relief and with the same prayer, now, these two petitions have been brought forth, but the petitioner has invented a new cause of action as if there was a resolution passed by the Municipality for relocation of the project in another place and that has given a cause of action to bring forth the writ petitions. In the instant case, the issues have been directly and substantially same, and the prayers are also same. It is a well settled proposition of law that in a given case like this, though it is a public interest litigation, when it has been decided by the court on the same ground earlier, no one could further re-agitate the matter and it is a fit case where the res judicate theory has got to be applied and these petitions be dismissed.

(ii) Secondly, in the instant case, the total area was 3 acres 24993 sq. ft. and in the northern east corner of the said tank, 8712 sq. ft. has been taken for the purpose of the project which would represent only 7% of the total area and thus, in no way, it would affect the interest of the public. It is true, originally, in the long past, the Marikulam tank was a water source, but in the recent past decades, it was not so, and thus,

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it is not correct to state that it is a water source. Following the approval of the National River Conservation Department, the project has been further proceeded with. The G.O.Ms.No.41 Revenue Department, dated 20.1.1987 is not applicable to the present facts or situation. That Government Order was meant for the purpose of removal of encroachment and only a ban for encroachment. But, in the case on hand, there was neither encroachment nor removal of encroachment; but, it was a case where a particular land was taken for the purpose of constructing a pumping station in question and that too, for public interest.

(iii)As could be seen, in the earlier writ petition, the TWAD was not a party; but, they were summoned, and they filed a detailed affidavit, which was incorporated in the order of the Division Bench of this court in the earlier case. In that, it has been clearly stated that in no way, it would affect the ecology, and it would not create any health problem. The court, on appraising the circumstances, has passed the order. Further, once the court has taken into consideration the facts and circumstances and has also denied the relief finding that it is for and in the interest of the public, these writ petitions have got to be dismissed.

9.The learned Advocate General would further submit that in the instant case, the petitioner is unable to show that it is actually against the interest of the public. On the contrary, the project was actually meant for public interest, and it is in progress, and except a few percentage, the work is over, and the State has spent crores of rupees over the same and under these circumstances, the petitions have been vexatiously brought forth and hence, they have got to be dismissed with exemplary costs.

10.In answer to the above, the learned counsel for the petitioner would submit that in the instant case, the principles of res judicata cannot be applied. It is true, the earlier writ petition was taken as Public Interest Litigation, but it was only for the purpose of stopping the respondent from locating the project to a particular place, but these two writ petitions have nothing to do with the same. In G.O.Ms.No.497, dated 30.8.2005, the transfer of land was originally made and this was never challenged and thus, the causes of action are different and the prayers are also different and hence, it cannot be applied.

11.Added further the learned counsel that once it is an admitted fact that a part of the tank is given for the project, it would go against the interest of the public and also against the G.O.Ms.No.41, and under these circumstances, the contention of the State that there is neither violation of the G.O. nor the circular is of no avail and they have got to be rejected and the writ petitions be ordered.

12.The Court has paid its anxious consideration on the submissions made.

13.Admittedly, a proposal was laid for the purpose of carrying on a sewerage project in question in Marikulam Tank, to an extent of 8712 sq.ft. out of total area of 3 acres 24993 sq.ft. It is not in controversy that originally, there was resolution passed by the Thanjavur Municipality in January, 2001. Following the same, feasibility report from the Ministry of Environment and Forest, Government of India, was actually

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obtained and following the technical sanction, the work was commenced in January, 2003. It is also not in controversy that except a few percentage of work, major part of the work, as stated by the learned Advocate General, has been completed. In this context, the learned counsel for the petitioner would submit that merely because crores and crores of rupees have been spent by the State cannot be the reason to continue or permit the illegal act. The court is able to see force in the contention. But, the test is whether the act, what has been done, could be termed as the act, which is in violation of G.O.Ms.No.41 or circular or against the mandatory provisions or in breach of a duty cast upon the State under the Constitution. If it is analysed, the court is of the considered opinion that the answer has got to be made in negative.

14.At the outset, the court has to state that these petitions have got to be rejected on the ground of principles of res judicata. The whole subject centre around the sewerage project, which is in progress in 8712 sq.ft., out of total area of 3 acres 24993 sq.ft. in the Marikulam tank. It is not in controversy that originally the tank was classified as Government Tank Poramboke in the revenue records. There arose a necessity for classification to be made in respect of 8712 sq.ft. for the purpose of the project, as town poromboke. It is also not in controversy that out of 3 acres 24993 sq.ft., 8712 sq.ft. is situated in north eastern corner. After the project was commenced and transfer was actually made, the earlier writ petition was filed before this court and that too by the member of the same committee. The petitioner in both these petitions is also a member of the same committee. At the time when the earlier writ petition was filed, the order of transfer in G.O.Ms.No.497 was very well available. It is true, it was not referred to in the earlier writ petition. But the subject matters in the earlier writ petition and the present writ petition are factually and substantially same.

15.It is further to be pointed out that a reading of the factual positions in the earlier writ petition in W.P.No.31699 of 2005, which was filed as the Public Interest Litigation, would reveal that exactly the same facts are reiterated in the present two writ petitions. The prayer in the earlier writ petition was not to proceed with the construction activities in Marikulam Tank. The present one writ petition challenges the G.O. transferring the land and the prayer in the other writ petition is to stop further construction. All these writ petitions were against the project in question. The causes of action are more or less the same. It cannot be denied that certain causes of action were very well available, and the same were not mentioned in the earlier writ petition. Omission of causes of action available to a party at the time of the earlier proceedings, cannot be a reason not to apply the theory of res judicata. Thus, all the writ petitions were filed by the members of the same committee and the same centre around the stopping of proceedings further, and they all aimed to stop the project. Under these circumstances, the court is of the considered opinion that these two writ petitions would be directly hit by the decision taken in W.P.No.31699 of 2005.

16.To the question whether the project, what is in progress, would directly affect the ecology and environment and create health hazardous, the answer is in negative. In the earlier writ petition, though the TWAD Board was not the party, the court called upon the TWAD Board to file the

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affidavit. Accordingly, the TWAD Board has filed the affidavit before the court. It would be more apt and appropriate to reproduce a part of the affidavit filed by the TWAD Board in the earlier writ petition which reads thus:

> "... So it has been properly ensured that there will not be any contaminations to any water resources nearby and there will not be any health hazards to the public living around. Though the depth of the wells are more than 10 m below ground level, the waste water will be stored to a depth of 3 m from the top of bottom slab to a detention period of 10 minutes only and it will be continuously pumped through non-clogging submersible pump sets to the sewerage treatment plant situation around 5 km away from the pumping station through closed pipes. So constant stagnation of wastewater and emanating objectionable smells will not arise."

A reading of the same would clearly reveal that there was no health hazardous to the public living around that area. The contention that if the project is allowed to be carried on, it will be going against the ecology, environment or health, cannot be accepted.

17.Now, at this juncture, it would be more appropriate to reproduce the relevant portions of the G.O.(Ms) No.41 Revenue Department dated 20.1.1987, as follows:

> "3. மேலே பத்தி 1 மற்றும் 2ல் சொல்லப்பட்டுள்ள அரசாணைகள், நிலம் குத்தகைக்கு (Lease) விடுவதற்கும் மற்றும் உரிமை மாற்றம் (Alienation) செய்வதற்கும் பொருந்துமா என்பதற்கு பார்வை 4ல் கண்ட அரசுக் கடிதத்தில் நிலநிர்வாக ஆணையரது கருத்து கோரப்பட்டது. மாவட்ட ஆட்சியாளருடன் கலந்தாலோசித்து மேற்சொன்ன ஆணைகளை நிலம் குத்தகைக்கு விடுவதற்கும் உரிமை மாற்றம் செய்வதற்கும் பொருந்துமாறு செய்யலாமென்றும், எனவே இது சம்பந்தமாக ஆணை பிறப்பிக்கும் படியும் நில நிர்வாக ஆணையர் கருத்து தெரிவித்துள்ளார். ஓடை,வாய்க்கால், குளம் ப,றம் போக்கு நிலங்களை குத்தகைக்கு விடுவதற்கும் உரிமைமாற்றம் செய்வதற்கும் செயற்குறிப்பு, அனுப்பு,வதற்கு முன்னால் மாவட்ட வருவாய் அலுவலர்கள் நேரடியாக சம்பந்தப்பட்ட நிலங்களைத் தணிக்கை செய்யவேண்டும் என நிலநிர்வாக ஆணையர் பார்வை 5ல் கண்ட அவரது கடிதத்தில் கருத்து தெரிவித்துள்ளார்.
>
> 4,,,,,,,,,,,,,,, எனவே, மேலே சொல்லப்பட்ட அனைத்து நீர்நிலைப்பு,றம் போக்கு நிலங்களில் உள்ள ஆக்கிரமிப்பு,களை வரன்முறைப்படுத்தும் செயற்குறிப்பு,களுக்கு ஒரு முழுமையான தடையை அரசு இதன்மூலம் விதிக்கிறது."

18.The Circular issued by the Commissioner of Land Administration Department and dated 2.4.2001, reads thus:

> "The Government have already issued ban orders, followed by instructions from time to time, for allotment of Government lands, classified as water course/source, porambokes and Grazing Ground/Meikkal Porambokes, by way of transfer, alienation, lease etc. Hence the District Collectors/District Revenue Officers should desist themselves from sending such proposals, relating to these categories of Government lands.
>
> However, in exceptional cases, taking into account the ground realities, if it is considered that there is no other go, except to concede to the request for allotment of such lands, in larger public interest, the District Collectors may send proposals, in relaxation of ban orders, to the Government through Commissioner of Land Administration, Chennai, for their considerations.

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2).....
3)Therefore all the District Collectors/District Revenue Officers are requested to send such proposals, justifying the compelling reasons for the proposed allotment of lands in these banned categories of lands, along with the remarks/opinion of the concerned Regional Chief Engineer, (WRO) P.W.D (or) the Director of Animal Husbandry Department, Chennai or the Heads of relevant Departments as the case may be."

19.A conjoined reading of both the G.O. and the circular issued by the State Government would make it clear that the water sources like river, tank, etc., have to be protected by taking all necessary measures and also all the encroachments made thereon, were to be removed; and that the Revenue Officials should desist from forwarding the proposals for transfer, alienation, lease, etc., of the lands classified as water course/source etc.,; but, in exceptional cases, such proposals for allotment of such lands could be forwarded taking into consideration the ground realities and if it was in larger public interest and there were justifying compelling reasons. From the materials available, it cannot be denied that the transfer of 8000 and odd sq. ft. that was effected by the Government under the impugned G.O., to the Thanjavur Municipality is situated on the north eastern corner of Marikulam Tank. So long it is a part and parcel, however small the area be, a duty is cast upon the State to show that for making allotment of such piece of land classified as water source, there were compelling reasons, and it is also in the larger public interest. The project itself is for the construction of the sewerage treatment plant, and it is only a pumping station. Without any stagnation of the drainage and sewerage water, it would be pumped out within a short span of time. The project itself was mainly intended for the purpose of protecting three rivers namely Cauvery, Vennar and Vettar, from being polluted or contaminated by the drainage and sewerage water. In such circumstances, it can be well stated that the allotment of the said land was under compelling reasons and also in the larger public interest.

20.Once a complaint like this that it would affect the public interest, the court has to see and weigh the circumstances. In the instant case, from the available materials it could be seen that the project itself has been brought to pump out the sewerage water to a place where the sewerage treatment plant has been set up. It is not a place where all the drainage and sewerage water are being stagnated, but it is only a pumping station. It could be further noticed that the detention period is only 10 minutes and then, it will be pumped out and hence, there is no question of stagnation. The court has considered the same in the earlier writ petition and has found that the project is for the larger public interest. In fact, the project in question is intended for the purpose of protecting the three rivers, namely Cauvery, Vennar and Vettar, from getting polluted or contaminated by sewerage water.

21.In a given case once the project is brought by the State, taking into consideration the larger public interest, the court is of the considered opinion that it cannot be branded as one against the public interest and it should be welcomed. In the instant case, it is an admitted position that the total area of the tank is 3 acres and 24993 sq.ft. and

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the project in question is situated in the north eastern corner of the tank in an area of 8712 sq.ft. It is true, the tank, even for a lesser extent, cannot be allowed to use for any purpose which is against the public interest. Once it is brought to the notice of the court that it is only a pumping station and there is no stagnation of sewerage water and it will be pumped out within 10 minutes, as stated by the TWAD Board in the earlier writ petition, no way it would create health hazardous. Under these circumstances, it could be seen that the project itself is by way of public interest and there is no question of stopping the project or quashing the transfer order. Both the writ petitions are liable to be dismissed. Accordingly, they are dismissed. No costs. Consequently, connected MPs are also dismissed.

Sd/-
Asst. Registrar.

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Sub Asst. Registrar.

vvk

To
1.The Secretary
The Government of Tamil Nadu,
Municipal Administration Department,
Fort St. George,
Chennai.
2.The Director of Municipal Administration,
Kuralagam, Chennai-600 104.
3.The Chairman,
Tamil Nadu Water and Drainage Board,
Government Estate,
Chepauk,
Chennai-600 002.
4.The Commissioner,
Thanjavur Municipality,
Thanjavur.
5.The District Collector,
Thanjavur District,
Thanjavur.
6.The Secretary,
The Government of Tamil Nadu,
Revenue Department,
Fort St. George, Chennai.

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7.The Executive Engineer,
Tamil Nadu Water Supply and
Drainage Board,
Sewerage Division,
Thanjavur.

+ 1 CC To Mr. R.Rajaram, Advocate SR NO.57077

+ 2 CCs To Mr.V.Raghupathi, Advocate SR NO.57201, 57262

+ 1 CC To Mr.Sudharshana Sundar, Advocate SR NO.57108

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